

The background of the page features a large, light gray circular seal. The outer ring of the seal contains the text "STATE OF WEST VIRGINIA" at the top and "DEPARTMENT OF TRANSPORTATION" at the bottom. Inside the ring is a map of West Virginia, and a large, stylized, light gray letter "S" is superimposed over the map.

West Virginia

Department of Transportation

**Unified Certification Program**

**Agreement**

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## **SECTION 1. DEFINITIONS**

### **1.1 Agreement**

"Agreement" means this document, the West Virginia Unified Certification Program Agreement.

### **1.2 Committee**

"Committee" means the Committee created by this document to administer and implement the Unified Certification Program.

### **1.3 Contract**

"Contract" means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them.

### **1.4 Contractor**

"Contractor" means one who participates, through a contract or subcontract (at any tier), in a USDOT-assisted highway, transit, or airport program.

### **1.5 Disadvantaged Business Enterprise or DBE**

"Disadvantaged Business Enterprise" and "DBE" mean a for-profit small business concern-

- A. That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and
- B. Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it; and
- C. That meets all certification criteria under 49 CFR, Part 26 and has been certified by the UCP.

### **1.6 Immediate Family Member**

"Immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law.

### **1.7 Indian Tribe and Tribally-Owned Concern**

"Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native Corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. A "tribally-owned concern" is that which is at least 51 percent owned by an Indian tribe as defined in this section.

### **1.8 Joint Venture**

"Joint venture" means an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the

contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

## **1.9 Operating Administration**

"Operating administration" means the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), or Federal Transit Administration (FTA).

## **1.10 Personal Net Worth**

"Personal net worth" means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include the individual's ownership interest in an applicant or participating DBE firm or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

## **1.11 Primary Industry Classification**

"Primary Industry Classification" means the six digit North American Industrial Classification System (NAICS) code designation which best describes the primary business of a firm. Hardcopies of the North American Industrial Classification System (NAICS) are available through the National Technical Information Service (NTIS) of the U.S. USDOT Commerce (Springfield, VA, 22262). NAICS information may also be obtained online at: <http://www.census.gov/eos/www/naics>.

## **1.12 Recipient**

"Recipient" means a West Virginia recipient of any of the following types of funds authorized under Titles 23 and 49 of the United States Code, including funds described under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, or SAFETEA-LU:

- A. Federal-aid highway funds authorized under Chapter 1 of 23 USC
- B. Public transportation funds authorized by Chapter 3 of 23 USC
- C. Highway safety funds made available under Chapter 4 of 23 USC
- D. Airport financial assistance programs authorized under Chapter 471 of 49 USC.

## **1.13 Regulation**

"Regulation" means 49 CFR, Part 26, and any revisions, additions, deletions, or replacements.

## **1.14 Socially and Economically Disadvantaged Individual**

"Socially and economically disadvantaged individual" means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is:

- A. Any individual who the UCP Committee finds to be a socially and economically disadvantaged individual on a case-by-case basis.
- B. Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
  - 1. "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

2. "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
3. "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
4. "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Mariana Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;
5. Subcontinent Asian Americans, which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
6. Women;
7. Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

### **1.15 State**

"State" means the State of West Virginia.

### **1.16 Unified Certification Program or UCP**

"Unified Certification Program" and "UCP" mean the program created by this agreement.

### **1.17 USDOT**

"USDOT" means the United States Department of Transportation.

### **1.18 USDOT Secretary**

"USDOT Secretary" means the Secretary of the United States Department of Transportation.

### **1.19 WVDOT**

"WVDOT" refers to the West Virginia Department of Transportation.

## **SECTION 2. ADMINISTRATION**

### **2.1 West Virginia Unified Certification Program**

The West Virginia Unified Certification Program ("the UCP") is established according to this agreement to certify all DBEs on USDOT-assisted projects in West Virginia. The WVDOT EEO Division coordinates the activities of the West Virginia Unified Certification Program.

### **2.2 West Virginia Unified Certification Committee**

#### **A. UCP Committee Established**

The West Virginia Unified Certification Program Committee ("the UCP Committee") is established to implement and administer the West Virginia Unified Certification Program. At least one member of the

UCP Committee will be female, and at least one other member will be a member of a minority group. The membership of the UCP Committee will consist of the following persons, or their designees:

1. Director of the Equal Employment Opportunity Division or designee (Committee chairperson)
2. Director of Contract Administration or designee (Committee Co-Chairperson)
3. Director of the Public Transit Division or designee
4. Director of the Engineering Division or designee
5. Director of the Finance Division or designee
6. A WVDOT attorney (non-voting legal counsel).

B. UCP Committee Authority and Duties:

1. The Committee will make all certification decisions on behalf of all agencies that receive USDOT funds in the State, with respect to participation in the USDOT DBE Program:
  - a. Certification decisions by the UCP Committee will be binding on all agencies within the State that receive USDOT funds.
  - b. The UCP Committee will provide "one-stop shopping" to applicants for certification, such that an applicant is required to apply only once for a DBE certification that will be honored by all agencies within the State that receive USDOT funds.
  - c. The UCP Committee will carry out all obligations related to certification and nondiscrimination that are established for agencies that receive USDOT funds.
2. Ensure that only firms that are eligible DBEs under 49 CFR 26 participate as DBEs in each agency's program; the Committee will accomplish this by strictly applying the eligibility standards of 49 CFR 26 to all eligibility determinations (this does not require the UCP Committee to monitor the agencies that receive USDOT funds);
3. Maintain a Unified DBE directory containing all firms certified by the UCP Committee; in the listing for each firm, include its address, phone number, and the types of work the firm has been certified to perform as a DBE. The UCP Committee will also:
  - a. Make the directory available to the public electronically, on the internet, as well as in print; and
    - i. The electronic directory will be maintained by the WVDOT EEO Division on its website for public viewing.
    - ii. The electronic directory will be updated monthly by the WVDOT EEO Division.
  - b. Make updated information available to contractors and the public on request.
4. Cooperate fully with oversight, review, and monitoring activities of the USDOT and its operating administrations;
5. Implement USDOT directives and guidance concerning certification matters; and
6. Make all decisions administering and implementing the UCP.

C. All certifications by the UCP Committee will be pre-certifications; i.e., certifications that have been made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE.

- D. Certification of Out-of-State firms - The UCP Committee will not process an application for certification from a firm having its principal place of business outside the State if the firm is not certified by the UCP in the state in which it maintains its principal place of business. The UCP Committee does not automatically accept the certification of any other state's UCP or any other recipient of USDOT funds that certifies DBEs. As a "home state" UCP, the Committee will share its information and documents concerning the firm with other state UCPs that are considering the firm's application under 49 CFR 26.
- E. The WVDOT will ensure that the UCP Committee has sufficient resources and expertise to carry out the requirements of this agreement.

### **2.3 Nonapplicable Contracts**

- A. If the WVDOT is letting a contract and that contract is to be performed entirely outside the United States, its territories and possessions, Puerto Rico, Guam, or the Northern Marianas Islands, this agreement does not apply to the contract.
- B. If the WVDOT is letting a contract in which there is no USDOT participating financial assistance, this agreement does not apply to the contract; however, the provisions of Title VI are still applicable to all contracts and all aspects of the WVDOT's operations.

## **SECTION 3. PROCEDURES**

### **3.1 Policy for Processing Applications**

- A. The UCP Committee will process applications for certification as a Disadvantaged Business Enterprise for firms that are:
  - 1. organized for profit and whose principal place of business is located within West Virginia, or
  - 2. organized for profit with a principal place of business outside West Virginia AND certified by the state in which that principal place of business is located (the firm's "home state")
- B. Firms determined as ineligible to participate in the DBE program and have been denied certification based on 49 CFR, Parts 26 will not reapply for certification for twelve (12) months from date of denial, unless a shorter waiting period is determined by the UCP at the time of the denial.

### **3.2 Application and Decision**

- A. Application – To become a DBE, a firm must submit an application to the UCP:

WV DBE Program  
WVDOT EEO Division  
Bldg 5, Room 948  
Charleston, WV 25305

Telephone: 304-558-3931  
Facsimile: 304-558-4236



1. West Virginia firms – West Virginia firms will submit a WV application, available online at: <http://www.transportation.wv.gov/eo/DBE/Pages/PersonalFinancialStatement.aspx>. Hardcopies may be obtained from the WV DBE Program at the address shown above.
2. Out-of-State Firms – Out-of-state firms must submit a complete copy of the application form, all supporting documents, and any other information submitted to the firm's home state or any other state related to the firm's certification, including no-change affidavits, notices of change, and correspondence with the home state or any other state related to certification. Out-of-state firms must also submit a completed interstate affidavit.
3. Affidavit or unsworn declaration required – The UCP Committee will ensure that the applicant attests to the accuracy and truthfulness of the information on the application form. This will be done either in the form of an affidavit sworn to by the applicant before a person who is authorized by State law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States.
4. EEO Division review – The EEO Division will review all information on the form and associated documentation provided by DBE applicant.

B. Onsite Reviews

1. West Virginia firms. For firms with a principal place of business located in West Virginia, an onsite review will be conducted by the WVDOT EEO Division; the reviewer will:
  - a. Interview the principal officers of the firm and review their resumes and/or work histories; and
  - b. Perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in the local area.
2. Out-of-State firms. The UCP Committee will rely upon the site visit report of any other USDOT recipient agency with respect to a firm applying for certification. If an onsite review within the last 3 years by the home state certifying authority is not available, the out-of-state firm will be required to submit an affidavit to affirm that the facts in the onsite report remain true and correct.

C. Committee Meetings

1. The WVDOT EEO Division will report its findings to the UCP Committee.
2. The UCP Committee will meet monthly, either in person, by phone, electronically or any combination thereof, to review and determine certification eligibility.
3. Three (3) UCP Committee members, or designee(s), will constitute a quorum, and the approval of the quorum regarding certification decisions will be binding on the entire UCP Committee.
4. The Committee may require a West Virginia applicant firm to appear in person at a Committee meeting as part of the application process.

D. Certification Decisions

1. The UCP Committee will take all the following steps in determining whether a DBE firm meets the standards of Section 3 of this agreement:

- a. Review the Uniform Certification Application and supporting documents submitted by the firm;
- b. Review the onsite review completed within the past 3 years by the WVDOT EEO Division, or, in the case of an out-of-state applicant, by the home state certifying authority;
- c. Make a decision regarding certification based upon the record as a whole.

E. Timeline for Decisions

1. WV firms - The UCP Committee will make decisions on certification applications from West Virginia firms within 90 days of receiving from the applicant firm all information required under 49 CFR 26. The UCP Committee may extend this time period once, for no more than an additional 60 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension.
2. Out-of-State firms – The UCP Committee will make decisions on certification applications from out-of-state firms within 60 days of receipt of all information required from the firm under 49 CFR 26.
3. All firms – The UCP Committee's failure to make a decision by the applicable deadline under this section is deemed a constructive denial of the application. Such constructive denial will serve as a basis upon which the applicant firm may appeal to USDOT under section 3.3 of this agreement.

F. Records

1. The WVDOT EEO Division will maintain the files of processed DBE applications.
2. When any agency that receives USDOT funds makes a written request for certification information in connection with its consideration of the eligibility of a firm (e.g., including application materials or the report of a site visit, if the WVDOT has made one to the firm), the WVDOT EEO Division will promptly make the information available to the USDOT-recipient agency.
3. Once the UCP Committee has certified a DBE, the DBE will remain certified unless and until its certification has been removed through the procedures of subsection 3.2 of this agreement.

G. Monitoring of Continuing Eligibility of Certified Firms

1. Affidavit of Change – Within 30 days – Every DBE certified by the UCP Committee will inform the WVDOT EEO Division in writing of any change in circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this agreement or any material change in the information provided in the UCP Committee's application form.
  - a. Changes in management responsibility among members of a limited liability company are covered by this requirement.
  - b. The DBE will attach supporting documentation describing in detail the nature of such changes.
  - c. The notification of changes will take the form of an affidavit sworn to by the owners of the firm before a person who is authorized by State law to administer oaths executed under penalty of perjury of the laws of the United States.

- d. The DBE will provide the written notification within 30 days of the occurrence of the change.
  - e. If the DBE fails to make timely notification of such a change, it will be deemed to have failed to cooperate in accordance with section 26.83(1)(3) of the Regulation and will be subject to decertification in accordance with the procedures set forth in § 3.4 of this document.
2. *Affidavits of No Change - Annually.* Every DBE will provide to the UCP Committee via the WVDOT EEO Division, on the anniversary of the date of the DBE's certification, an affidavit sworn to by the firm's owners before a person who is authorized by State law to administer oaths executed under penalty of perjury of the laws of the United States.
- a. This affidavit will affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of 49 CFR 26 or any material changes in the information provided in its application form, except for changes about which the DBE has notified the UCP Committee under paragraph (1) of this section, above.
  - b. The form of the affidavit will be provided by the UCP Committee through the WVDOT EEO Division; the affidavit:
    - i. will specifically affirm that the firm continues to meet SBA business size criteria and the overall gross receipts cap of 49 CFR §26.65(b)
    - ii. will document this affirmation with supporting documentation of the firm's size and gross receipts.
  - c. *Failure to Comply -* If a DBE firm fails to provide either affidavit in a timely manner, it will be deemed to have failed to cooperate and will be subject to decertification under section 3.4 of this document.

### **3.3 Denials**

- A. When the UCP Committee denies a request by a firm to be certified as a DBE, the WVDOT EEO Division will provide the firm a written explanation of the UCP Committee's reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based will be made available to the applicant, upon request.
- B. When a firm is denied certification, a time period of twelve months will elapse before the firm may reapply through the WVDOT EEO Division for certification, unless a shorter waiting period is established by the UCP at the time of denial. The time period for reapplication begins to run on the date the denial letter required by paragraph (A) of this section is received by the applicant firm.
- C. A firm may request that a denial be evaluated by a WVDOT Review Committee, composed of knowledgeable individuals who did not participate in the original evaluation of the application.
- D. When the UCP Committee makes an administratively final denial of certification concerning a firm, the firm may appeal the denial to the USDOT under section 3.5 of this agreement.

### 3.4 Removals

#### A. Basis for Decertification Proceeding

1. Ineligibility complaints: Any person may file a written complaint with the UCP Committee alleging that a currently certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. The UCP Committee is not required to accept a general allegation that a firm is ineligible nor an anonymous complaint. Confidentiality of complainant identities will be protected as provided in section 49 CFR 26.109(b).
  - a. The UCP Committee will refer the complaint to the WVDOT EEO Division, which will review its records concerning the firm, any material provided by the firm and the complainant, and other available information and present its results and recommendations to the UCP Committee. The UCP Committee may request additional information from the firm or conduct any other investigation that it deems necessary.
  - b. If the UCP Committee determines, based on this review, that there is reasonable cause to believe that the firm is ineligible, it will provide written notice to the firm that it proposes to find the firm ineligible, setting forth the reasons for the proposed determination. If the UCP Committee determines that such reasonable cause does not exist, it will notify the complainant and the firm in writing of this determination and the reasons for it. All findings on the issue of reasonable cause will specifically reference the evidence in the record on which each finding is based.
2. UCP Committee-initiated proceedings: The UCP Committee may determine that a currently certified DBE firm may not eligible for DBE certification. This determination may be based on notification by the firm of a change in its circumstances or other information that comes to the attention of the UCP Committee. If this occurs, the UCP will request that the WVDOT EEO Division conduct a review and inform the UCP Committee of the results. If the UCP Committee finds reasonable cause that the DBE firm is no longer eligible, the Committee will provide written notice to the firm that it proposes to find the firm ineligible, setting forth the reasons for the proposed determination. All findings on the issue of reasonable cause will specifically reference the evidence in the record on which each finding is based.
3. USDOT-Directed Action: If the USDOT determines that information in WVDOT certification records, or other available information, provides reasonable cause to believe that a DBE-certified firm does not meet the eligibility criteria, the USDOT may direct the WVDOT to initiate a proceeding to remove the firm's certification. The WVDOT will provide notice to the firm and begin a decertification proceeding.

- B. Hearing: When the UCP Committee notifies a firm that there is reasonable cause to remove its eligibility as provided in paragraphs A.1, A.2, or A.3 of this section, it will give the firm an opportunity to appear in person for an informal hearing at the Unified Certification Program Committee level, at which the firm may respond to the specific findings supporting the recommendation to remove its eligibility. The firm may provide information and arguments concerning why it should remain certified.

1. In such a proceeding, the UCP Committee bears the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of 49 CFR 26.

2. The UCP Committee will maintain a complete record of the hearing and will retain the original record of the hearing at the offices of the WVDOT. The UCP Committee may charge the firm for the cost of copying the record.
  3. The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, the UCP Committee bears the same burden of proving that the firm does not meet the certification standards; proof must still be by a preponderance of the evidence as it would if a hearing was held.
- C. Separation of functions: The UCP Committee will ensure that the decision in a proceeding to remove a firm's eligibility is made by neutral personnel. No office and personnel that sought the removal of eligibility will take part in the eligibility decision. Further, the UCP Committee will ensure that any office or personnel involved in making a removal decision are not subject to direction from the office or personnel proposing the removal. Decision makers will be individuals who are knowledgeable about the certification requirements of the DBE program and this agreement.
- D. Grounds for Decision: The UCP Committee will not base a decision to remove eligibility on a reinterpretation or changed opinion of information that was available to the Committee at the time of its certification of the firm. The UCP Committee may base such a decision only on one or more of the following:
1. Changes in the firm's circumstances since the certification of the firm by the Committee that render the firm unable to meet the eligibility standards of 49 CFR 26;
  2. Information or evidence not available to the UCP Committee at the time the firm was certified;
  3. Information that was concealed or misrepresented by the firm in previous certification actions by a certifying agency such as the WVDOT or other state DOT;
  4. A change in the certification standards or requirements of the USDOT since the UCP Committee certified the firm; or
  5. A documented finding that the UCP Committee's determination to certify the firm was factually erroneous.
  6. Failure by the firm to cooperate with program requirements, including failure to submit annual updates or to participate in scheduling onsite reviews.
- E. Notice of decision: Following the UCP Committee's decision, it will provide the firm written notice of the decision not later than ten (10) working days; the notice will state the reasons for the decision, including specific references to the evidence in the record that supports each reason. The notice will inform the firm of the consequences of the decision and of the availability of an appeal to the Review Committee under Section 3.3 of this agreement.
- F. Status of firm during proceeding:
1. A firm remains an eligible DBE during the pendency of the proceeding to remove its eligibility.

2. The firm does not become ineligible until the issuance of the notice provided for in paragraph E of this section, above.
- G. Effects of removal of eligibility: When the UCP Committee removes a firm's eligibility, it will take the following action:
1. The firm will not be eligible to participate as a DBE even though the firm's name may remain in the directory until the next update.
  2. When a prime contractor has made a commitment to using the ineligible firm, or the WVDOT or other agency has made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before the UCP Committee issues the decertification notice provided for in paragraph (A) of this section, the ineligible firm does not count toward the project goal or overall goal.
  3. If a prime contractor has executed a subcontract with the firm before the UCP Committee has notified the firm of its ineligibility, the prime contractor may continue to use the firm on the project and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where the WVDOT or other agency has let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance on the project remaining after the UCP Committee issued the notice of its ineligibility will not count toward the WVDOT's or other agency's overall goal, but may count toward the project goal.
  4. Exception: If the DBE's ineligibility is caused solely by its having exceeded the size standard during its performance on the project, the recipient may continue to count its participation on that project toward overall and project goals.

### **3.5 Review and Appeal Procedures**

- A. WVDOT Review – When a firm is notified of either a denial of certification or that the WVDOT has found reasonable cause to initiate a proceeding to terminate the firm's certification, the firm will be given an opportunity for an informal hearing.
1. Hearing – The firm may elect to request a hearing, at which it may respond in person to the reasons for the denial or for the proposal to remove the firm's certification. Hearings will be scheduled within 30 days of the firm's request.
  2. Written Submission – The firm may also respond in writing, through information and arguments submitted during, or in lieu of, a hearing on the matter. The firm's written submission shall state the firm's position regarding why the firm should be certified, or should retain its existing certification.
  3. Written Decision – The Hearing Committee will issue a written decision within 30 days of the Hearing Committee's receipt of the firm's written response or the firm's meeting with the Hearing Committee, whichever is later.
  4. Stay During Review – The firm's application for certification, or the WVDOT's removal proceeding, is stayed pending the outcome of this review process.
  5. Appeal – A decision under this paragraph may be appealed to the Departmental Office of Civil Rights under 49 CFR §26.89.
- B. USDOT Appeal

1. Party to Appeal

- a. Appeal by firm – A firm which has been denied certification, whose certification has been removed, whose owner has been determined not to be a member of a designated disadvantaged group, or concerning whose owner the presumption of disadvantage has been overcome may make an administrative appeal to the USDOT.
- b. Appeal by third-party complainant – A complainant in an ineligibility complaint to the UCP Committee may appeal to the USDOT if the UCP Committee does not find reasonable cause to propose removing the firm's eligibility or, following a removal of eligibility proceeding, determines that the firm is eligible.

2. Procedure for USDOT Appeal:

- a. Parties wishing to appeal will send a letter to the USDOT within 90 days of the date of the UCP Committee's final decision; the USDOT may accept an appeal filed later than 90 days from the date of decision if it determines that there was good cause for the late filing.
- b. The letter will contain information and arguments concerning why the UCP Committee's decision should be reversed.
- c. The letter will be addressed to:

U.S. Department of Transportation  
Office of Civil Rights  
1200 New Jersey Avenue, SE  
Washington, D.C. 20590

- C. Status During Pendency of Review or Appeal – Pending the WVDOT's decision on a requested review, or the USDOT's decision on an appeal, the UCP Committee's decision remains in effect. Neither the WVDOT nor the USDOT stay the effect of the UCP Committee's decision while it is considering an appeal.
- D. UCP Records Submitted During Appeal – If the UCP Committee provides supplementary information to the USDOT, it will also make this information available to the firm and any third-party complainant involved, consistent with Federal or applicable State laws concerning freedom of information and privacy.

### **3.6 Result of Review or Appeal**

- A. The decision on a review or appeal under section 3.5 of this agreement is binding on the UCP Committee whose decision was appealed.
- B. The WVDOT shall take the action directed by a WVDOT Hearing Committee or USDOT decision immediately upon receiving written notice of it.
- C. Where the USDOT has upheld denial of certification or removal of eligibility from a firm by another agency recipient of USDOT funds, or by another UCP, or directed the removal of a firm's eligibility, the UCP Committee may commence a proceeding to remove the firm's eligibility, as provided in section 3.3 of this agreement. The UCP Committee will not remove the firm's eligibility absent such a proceeding. Where USDOT has reversed a denial of certification to or

removal of eligibility from a firm, the UCP Committee will take the USDOT action into account in any certification action involving the firm. However, the UCP Committee will not be required to certify the firm based on the USDOT decision.

## **SECTION 4. STANDARDS**

### **4.1 Generally**

- A. In determining whether to certify a firm as eligible to participate as a DBE, the UCP Committee will apply the standards of this section.
- B. The UCP Committee will evaluate the eligibility of a firm on the basis of present circumstances. The UCP Committee will not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of 49 CFR 26. The UCP Committee will not refuse to certify a firm solely on the basis that it is a newly formed firm.
- C. DBE firms and firms seeking DBE certification will cooperate fully with the UCP Committee's requests for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification.
- D. Only firms organized for profit may be eligible DBEs. Not-for-profit organizations, even though controlled by socially and economically disadvantaged individuals, are not eligible to be certified as DBEs.
- E. Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business, owned and controlled by socially and economically disadvantaged individuals.
- F. The UCP Committee will not require a DBE firm to be prequalified as a condition for certification.

### **4.2 Burdens of Proof**

- A. The firm seeking certification has the burden of demonstrating to the UCP Committee, by a preponderance of the evidence, that it meets the requirements of this section concerning group membership or individual disadvantage, business size, ownership, and control .
- B. The UCP Committee will rebuttably presume that members of the designated groups identified in section 4.4 of this agreement are socially and economically disadvantaged. This means that they do not have the burden of proving to the UCP Committee that they are socially and economically disadvantaged. To obtain the benefit of this presumption, an applicant must submit an Affidavit of Certification of Social and Economic Disadvantage.
- C. An otherwise socially and economically disadvantaged individual is presumed NOT to have valid ownership interest in portions of the firm acquired from a non-DBE as a gift or transfer without



adequate consideration as described in 49 CFR 26.69(h) UNLESS the socially and economically disadvantaged owner establishes the validity of such ownership interest is established by clear and convincing evidence.

#### **4.3 Business Size**

- A. To be an eligible DBE, a firm (including its affiliates) will be an existing small business, as defined by Small Business Administration (SBA) standards. The UCP Committee will apply current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts.
- B. Even if it meets the requirements of paragraph (A) of this section, a firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts as defined by SBA regulations (see 13 CFR 121.402), in excess of \$22.41 million over the firm's previous three fiscal years.

#### **4.4 Socially and Economically Disadvantaged Persons**

##### **A. Presumption of disadvantage**

- 1. The UCP Committee will rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. The UCP Committee will require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.
- 2. The UCP Committee will require each individual owner of a firm applying to participate as a DBE whose ownership and control are relied upon for DBE certification to submit a signed, notarized statement of personal net worth, with appropriate supporting documentation.
  - a. In determining net worth, the UCP Committee will exclude an individual's ownership interest in the applicant firm and the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). A contingent liability does not reduce an individual's net worth.
  - b. Assets held in vested pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences are included in personal net worth based only on the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time.

##### **B. Rebuttal of presumption of disadvantage**

- 1. *Personal Net Worth Exceeds Limits* – If the statement of personal net worth that an individual submits under paragraph (A)(2) of this section shows that the individual's personal net worth exceeds that which is established by the relevant operating administration (\$1.32 million for general contracting and consulting under 49 CFR §26.67; \$750,000 for airport concessions under 23 CFR §23.35) the individual's presumption of economic disadvantage is rebutted.

The UCP Committee will not have a proceeding under paragraph (B)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

2. Group Membership – If the UCP Committee has a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged the UCP Committee may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. The proceeding will follow the review and appeal procedures of section 3.5 of this agreement.
  - a. In such a proceeding, the UCP Committee has the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. The UCP Committee may require the individual to produce information relevant to the determination of his or her disadvantage.
  - b. When an individual's presumption of social and /or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility under this subpart unless and until he or she makes an individual showing of social and /or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds the standard set forth in the regulation, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage.
3. Individual determinations of social and economic disadvantage – Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. The UCP Committee will make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to the UCP Committee, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds the standard will not be deemed to be economically disadvantaged. In making these determinations, use the guidance found in Appendix A of this agreement. The UCP Committee will require that applicants provide sufficient information to permit determinations under the guidance of Appendix A of this agreement.

#### **4.5 Ownership**

- A. In determining whether the socially and economically disadvantaged participants in a firm own the firm, the UCP Committee will consider all the facts in the record, viewed as a whole.
- B. To be an eligible DBE, a firm will be at least 51 percent owned by socially and economically disadvantaged individuals.
  1. In the case of a corporation, such individuals will own at least 51 percent of the each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.
  2. In the case of a partnership, socially and economically disadvantaged individuals will own 51 percent of each class of partnership interest. Such ownership will be reflected in the firm's partnership agreement.

3. In the case of a limited liability company, socially and economically disadvantaged individuals will own at least 51 percent of each class of member interest.
- C. The firm's ownership by socially and economically disadvantaged individuals will be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The disadvantaged owners will enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.
- D. All securities that constitute ownership of a firm will be held directly by disadvantaged persons. Except as provided in this paragraph (D), no securities or assets held in trust, or by any guardian for a minor, are considered as held by disadvantaged persons in determining the ownership of a firm. However, securities or assets held in trust are regarded as held by a disadvantaged individual for purposes of determining ownership of the firm, if:
1. The beneficial owner of securities or assets held in trust is a disadvantaged individual, and the trustee is the same or another such individual; or
  2. The beneficial owner of a trust is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policy- making, and daily operational activities of the firm. Assets held in a revocable living trust may be counted only in the situation where the same disadvantaged individual is the sole grantor, beneficiary, and trustee.
- E. The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests will be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.
- F. The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:
1. The owner's expertise will be—
    - a. in a specialized field;
    - b. of outstanding quality;
    - c. in areas critical to the firm's operations;
    - d. indispensable to the firm's potential success;
    - e. specific to the type of work the firm performs; and
    - f. documented in the records of the firm. These records will clearly show the contribution of expertise and its value to the firm.
  2. The individual whose expertise is relied upon will have a significant financial investment in the firm.

G. The UCP Committee will always deem as held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual --

1. As the result of a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce decree is inconsistent with this section; or
2. Through inheritance, or otherwise because of the death of the former owner.

H. Transfers by Gift or Without Adequate Consideration

1. The UCP Committee will presume as NOT being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is--
  - a. involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;
  - b. involved in the same or a similar line of business; or
  - c. engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.
2. To overcome the presumption above and permit the interests or assets to be counted, the disadvantaged individual will demonstrate to the UCP Committee, by clear and convincing evidence, that--
  - a. the gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
  - b. the disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.

I. The UCP Committee will apply the following rules in situations in which marital assets form a basis for ownership of a firm:

1. When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, the UCP Committee will deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. The UCP Committee will not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.
2. A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm will be included as part of the firm's application for DBE certification.

- J. The UCP Committee may consider the following factors in determining the ownership of a firm. However, the UCP Committee will not regard a contribution of capital as failing to be real and substantial, or find a firm ineligible, solely based on these factors:
1. A socially and economically disadvantaged individual acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration, other than the types set forth in paragraph (H) of this section;
  2. There is a provision for the co-signature of a spouse who is not a socially and economically disadvantaged individual on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents; or
  3. Ownership of the firm in question or its assets is transferred for adequate consideration from a spouse who is not a socially and economically disadvantaged individual to a spouse who is such an individual. In this case, the UCP Committee will give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual.
- K. An eligible DBE firm will be owned by individuals who are socially and economically disadvantaged. Except as provided in this paragraph, a firm that is not owned by such individuals, but instead is owned by another firm -- even a DBE firm -- cannot be an eligible DBE.
1. If socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, the UCP Committee may certify the subsidiary if it otherwise meets all requirements of this section. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company. The UCP Committee may certify such a subsidiary only if there is cumulatively 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals.
  2. A firm that is owned by an Indian tribe, Alaska Native Corporation, or Native Hawaiian organization as an entity, rather than by Indians, Alaska Natives, or Native Hawaiians as individuals, may be eligible for certification. Such a firm will meet the size standards of section 4.3 of this agreement. Socially and economically disadvantaged individuals, as provided in section 4.4 of this agreement, will control such a firm.

#### **4.6 Control**

- A. In determining whether socially and economically disadvantaged owners' control a firm, the UCP Committee will consider all the facts in the record, viewed as a whole.
- B. Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms. The UCP Committee will:
  1. In determining whether a potential DBE is an independent business, scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and /or bonding support, and other resources;

2. Consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm;
  3. Examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm; and
  4. In considering factors related to the independence of a potential DBE firm, consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.
- C. A DBE firm will not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm. This paragraph does not preclude a spousal co-signature on documents as provided for in section 4.5(J)(2) of this agreement.
- D. The socially and economically disadvantaged owners will possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.
1. A disadvantaged owner will hold the highest officer position in the company (e.g., chief executive officer or president).
  2. In a corporation, disadvantaged owners will control the committee of directors.
  3. In a partnership, one or more disadvantaged owners will serve as general partners, with control over all partnership decisions.
- E. Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals will not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.
- F. The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority will be revocable, and the socially and economically disadvantaged owners will retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs will be such that the WVDOT can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.

- G. The socially and economically disadvantaged owners will have an overall understanding of, and managerial and technical competence and expertise directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners will have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.
- H. If State or local law requires the persons to have a particular license or other credential in order to own and /or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type will possess the required license or credential. If State or local law does not require such a person to have such a license or credential to own and/or control a firm, the UCP Committee will not deny certification solely on the ground that the person lacks the license or credential. However, the UCP Committee may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.
- I. Differences in Remuneration
1. The UCP Committee may consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration will be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. The UCP Committee may determine that a socially and economically disadvantaged owner controls a firm although that owner's remuneration is lower than that of some other participants in the firm.
  2. In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, the UCP Committee may consider a difference between the remuneration of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual.
- J. In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

K. Family Participation in Firm

1. A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this section, the UCP Committee will make a judgment about the control the socially and economically disadvantaged owner exercises versus other persons involved in the business as the UCP Committee does in other situations, without regard to whether or not the other persons are immediate family members.
2. If the UCP Committee cannot determine that the socially and economically disadvantaged owners -- as distinct from the family as a whole -- control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.

L. Where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the non-disadvantaged individual remains involved with the firm in any capacity, the disadvantaged individual now owning the firm will demonstrate to the UCP Committee, by clear and convincing evidence, that:

1. The transfer of ownership and /or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
2. The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who formerly owned and/or controlled the firm.

M. In determining whether its socially and economically disadvantaged owners control a firm, the UCP Committee may consider whether the firm owns equipment necessary to perform its work. However, the UCP Committee will not determine that a firm is not controlled by socially and economically disadvantaged individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.

N. Types of Work

1. The UCP Committee will grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm.
2. To become certified in an additional type of work, the firm need demonstrate to the UCP Committee only that it's socially and economically disadvantaged owners are able to control the firm with respect to that type of work.
3. The UCP Committee will not, in this situation, require that the firm be recertified or submit a new application for certification, but the UCP Committee will verify the disadvantaged owner's control of the firm in the additional type of work.



4. The UCP may change a certification classification or description if there is a factual basis in the record; the UCP will not make after-the-fact statements about the scope of certification in the absence of evidence in the record of the certification action.
- O. A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the UCP Committee should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.
  - P. In order for a partnership to be controlled by socially and economically disadvantaged individuals, any non-disadvantaged partners will not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.
  - Q. The socially and economically disadvantaged individuals controlling a firm may use an employee leasing company. The use of such a company does not preclude the socially and economically disadvantaged individuals from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

## **SECTION 5. AVAILABILITY AND CONFIDENTIALITY OF RECORDS**

### **5.1 Availability of Records**

- A. In responding to requests for information concerning any aspect of the DBE program, the WVDOT complies with provisions of the Federal Freedom of Information (5 U.S.C. 552) and Privacy Acts (5 U.S.C. 552a). The West Virginia Department of Transportation may make available to the public any information concerning the DBE program release of which is not prohibited by State or Federal law.
- B. The WVDOT will safeguard from disclosure to unauthorized persons information that may reasonably be considered as confidential business information, consistent with Federal, State, and local law. Notwithstanding any contrary provisions of state or local law, the UCP Committee will not release personal financial information submitted in response to the personal net worth requirement to a third party (other than USDOT) without written consent of the submitter.

### **5.2 Confidentiality of Information on Complainants**

Notwithstanding the provisions of subsection 5.1, the identity of complainants will be kept confidential, at their election. If such confidentiality will hinder the investigation, proceeding or hearing, or result in a

denial of appropriate administrative due process to other parties, the complainant will be advised for the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing. FAA follows the procedures of 14 CFR Part 16 with respect to confidentiality of information in complaints.

## **SECTION 6. COOPERATION AND INTIMIDATION**

### **6.1 Cooperation**

All participants in the WVDOT's DBE program (including, but not limited to, the Committee, DBE firms and applicants for DBE certification, complainants and appellants, and contractors using DBE firms to meet contract goals) are required to cooperate fully and promptly with WVDOT and/or UCP Committee compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so will be a ground for appropriate action against the party involved (e.g., a finding of noncompliance for a project or program; with respect to DBE firms, denial of certification or removal of eligibility and/or suspension and debarment; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment).

### **6.2 Intimidation and Retaliation**

The UCP Committee, recipients, contractors, or any other participant in the program, will not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by 49 CFR 26 or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under 49 CFR 26.

## **SECTION 7. ADDITIONAL PROVISIONS**

### **7.1 Liability**

Nothing contained in this agreement will imply any relationship between any of the signing parties beyond the administration of the Unified Certification Program (UCP). This agreement does not expand obligations imposed under existing law upon any party hereto or the UCP Committee, it does not create any liabilities to third parties in tort or in contract for injuries to persons or damage to property including, without limitation, damages or losses to business trade or reputation.

### **7.2 Records**

Each party agrees to keep and maintain under generally accepted accounting principles, full, true, and complete records and documents pertaining to this agreement and to present such information at any reasonable time for inspection, examination, review, audit, and copying at any office where such records and documentation are maintained.

### **7.3 Limitation on Association**

The parties are associated with each other only for the purposes and to the extent set forth in this agreement. Each party is and will be a public agency separate and distinct from the other party and will have the right to supervise, manage, operate, control, and direct performance of the details incident to its duties under this agreement. Nothing contained in this agreement will expand obligations under existing law, or be deemed or construed to create a partnership or joint venture, to create relationships of an employer-employee or principal-agent, or to otherwise create any liability for one agency whatsoever.

with respect to the indebtedness, liabilities, and obligations of the other agency or any other party beyond the administration of the UCP.

#### **7.4 Term**

This agreement will continue in effect until modified or terminated in writing by the parties hereto; provided, that this agreement will automatically terminate and the obligations of the parties cease should this agreement be in substantial non-compliance with present or future Federal laws or regulations.

#### **7.5 Entire Agreement**

This agreement constitutes the entire agreement of the parties with respect to the subject matter hereof, all oral and written prior to contemporaneous discussions and agreements being merged herein and superseded hereby.

#### **7.6 Severability**

Should any part of this Agreement be rendered or declared invalid by a court of competent jurisdiction of the State of West Virginia or the United States, such invalidation of such part or portion of this Agreement will not invalidate the remaining portions of this Agreement, and they will remain in full force and effect.

#### **7.7 Implementation Date**

Initial implementation: April 1, 2002

Revised: [new date]

## **APPENDIX A**

### **Social Disadvantage**

- I. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantage must stem from circumstances beyond the individual's control. Evidence of individual social disadvantage must include the following elements:
  - (A) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;
  - (B) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and
  - (C) Negative impact on entry into or advancement in the business world because of the disadvantage. The UCP Committee will consider any relevant evidence in assessing this element. In every case, however, recipients will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.
    - (1) Education. The UCP Committee will consider such factors as denial of equal access to institutions of higher education and vocational training, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.
    - (2) Employment. The UCP Committee will consider such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer or labor union; and social patterns or pressures which have channeled the individual into non-professional or non-business fields.
    - (3) Business history. The UCP Committee will consider such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.
    - (4) With respect to paragraph I.(A) of this appendix, the USDOT notes that people with disabilities have disproportionately low incomes and high rates of unemployment. Many physical and attitudinal barriers remain which impede their full participation in education, employment, and business opportunities available to the general public. The Americans with Disabilities Act (ADA) was passed in recognition of the discrimination faced by people with disabilities. It is plausible that many individuals with disabilities - especially persons with severe disabilities (e.g., significant mobility, vision, or hearing impairments) - may be socially and economically disadvantaged.
- II. Under the laws concerning social and economic disadvantage, people with disabilities are not a group presumed to be disadvantaged. Nevertheless, recipients should look carefully at individual showings of disadvantage by individuals with disabilities, making a case-by-case judgment about whether such an individual meets the criteria of this Appendix. As public entities subject to Title II

of the ADA, the UCP Committee will also ensure their DBE programs are accessible to individuals with disabilities. For example, physical barriers or the lack of application and information materials in accessible formats cannot be permitted to thwart the access of potential applicants to the certification process or other services made available to DBEs and applicants.

### **Economic Disadvantage**

- (A) General. Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.
- (B) Submission of narrative and financial information.
  - (A) Each individual claiming economic disadvantage must describe the conditions that are the basis for the claim in a narrative statement, and will submit personal financial information.
  - (B) When married, an individual claiming economic disadvantage also will submit separate financial information for his or her spouse, unless the individual and the spouse are legally separated.
- (C) Factors to be considered. In considering diminished capital and credit opportunities, the UCP will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including personal income for the past two years (including bonuses and the value of company stock given in lieu of cash), personal net worth, and the fair market value of all assets, whether encumbered or not. The UCP Committee will also consider the financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification, or, if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals in evaluating the individual's access to credit and capital. The financial profiles that the UCP Committee will compare include total assets, net sales, pre-tax profit, sales/working capital ratio, and net worth.
- (D) Transfers within two years.
  - (1) Except as set forth in paragraph (D)(2) of this appendix, the UCP Committee will attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust, a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a concern's application for participation in the DBE program, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.
  - (2) The UCP Committee will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.
  - (3) In determining an individual's access to capital and credit, the UCP Committee may consider any assets that the individual transferred within such two-year period described by paragraph (D)(1) of this appendix that are not considered in evaluating the individual's assets and net worth (e.g., transfers to charities).